學術討論

Women, Family, and Ch'ing Law: The Potential of Current Western Research

Robert J. Antony*

Recently there has been an upsurge among Western scholars in the history of Chinese women and the family, and also in China's legal history. Much of the current research on women, which is based largely on literary and artistic works, focuses on the culture of upper class women in the Ming and Ch'ing dynasties.① Important as these works may be, they still inform us only about a tiny fraction of the female population in the late imperial period. What about the "culture" of ordinary women and family life in general? This is where recent studies on Chinese legal history, most of which have been written in the last two or three years, show great potential. Several Western scholars are just now beginning to make important contributions to both women's and legal studies, but it is only a start, and much more research is needed. Instead of basing our image of

* Associate Professor, Department of History, Western Kentucky University

① Representative of this recent work is the publication of six articles in a symposium on poetry and women's culture, which appeared in the journal *Late Imperial China* (June 1992), and in books by Dorothy Ko (1994) and Susan Mann (1997).

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Chinese women solely on the writings of the elite, the new legal history is based on actual court records found in the Ch'ing archives. These archival materials are an important window onto the world of ordinary people, both men and women.

The Potential of Archival Research

The opening up of Ch'ing central government and local archives has provided the essential basis for new approaches to women's history, family history, and legal history. Since the 1980s a large number of American and European scholars and doctoral students have been doing research in the archives in mainland China and in Taiwan; many of these researchers have been engaged in studying Ch'ing social and legal history.② One of the main concerns of this new legal history is how the law affected the daily lives of ordinary people, including women, and what the law meant to them. Scholars are now able to rewrite late imperial China's history "from the bottom up."

What these archival materials, both imperial and local, offer is a depth of understanding that is virtually unobtainable from any other source. The richest trove of materials for both social and legal history are to be found in the actual court records contained in the central government's routine memorial collection (especially the *hsing-k'e t'i-pen* 刑科題本) and in the judicial records of local archives. The routine memorial cases incorporate summaries, often quite detailed, of testimonies, depositions, and confessions, as well as minute descriptions of judicial procedures. The court records found in local archives are generally even richer, with individual case files frequently containing hundreds of documents including

② For an appraisal of Ch'ing dynasty legal archives see Park and Antony (1993).

the original plaints, counterplaints, warrants, testimonies, depositions, and magisterial verdicts.

But just how representative are these archival case records? The recent research by Western scholars clearly shows that those people coming before the Ch'ing courts represented a broad cross-section of Ch'ing society.[3] Litigants coming before county magistrates were not merely criminals or the fringe elements of Chinese society, although there were naturally a good many of these people appearing at courts. Actually the courts regularly heard both civil and criminal cases of men and women, old and young, and those who were well-to-do as well as those who were poor. These court records, through testimonies and confessions, provide us with the voices of the inarticulate masses and are undoubtedly important sources for understanding the lifestyles, culture, and values of the common people in late imperial China.

Many of the archival case records are concerned with women who came before the courts as plaintiffs, defendants, victims, and witnesses. These records tell us much about the lives and culture of ordinary women, as well as their actual treatment and status under Ch'ing law. From the archival documents social historians can learn more about the composition of ordinary families (such as size, ages, gender differences, generational variances, and so forth), and intrafamilial relationships (between husband and wife, parents and children, in-laws, siblings, generations, and so on). Such information, when viewed in the aggregate, will help us to better understand the nature of commoner households in late imperial China, something that has alluded scholars in the past. The archival cases also allow us to glimpse into the intimate lives of individual women and their families. What in past scholarship was treated as an amorphus mass of

③ See in particular the studies by Allee (1994) and Huang (1996) which persuasively argue this very point.

faceless and nameless individuals can now come alive as unique women with faces and names and stories to tell us.

Women, Family, and Ch'ing Law

Most past Western scholarship focused on Ch'ing criminal law and paid little attention to civil law. This was only to be expected given the fact that earlier studies relied on the law codes which relegated civil cases to the status of "minor matters" (*hsi-shih* 細事). Many of the laws concerning what we today would consider civil matters (*min-shih* 民事), in fact, were obscurely hidden away in substatutes (*li* 例) in the "household section" (*hu-lü* 戶律) of the Ch'ing Code (*Ta-Ch'ing lü-li* 大清律例). Moreover, since most "civil cases" were settled at the local level, and often outside the courts through mediation, they were not considered important enough to be included in most collections of model case records. Since they had lacked the evidence of archival court records, earlier scholars assumed that civil law was insignificant and that civil cases were infrequently dealt with in the formal legal apparatus.

Contrary to perceived wisdom, however, recent studies show that Ch'ing courts actually handled many civil cases and that ordinary people often took advantage of the legal system to litigate disputes over business, property, debts, inheritance, and marriage. Rather than avoiding the law at all costs, it appears that Chinese people were much more litigious than we once suspected.④ Perhaps what is most surprising, given our standard view of traditional Chinese society, is that many of the litigants were women. Not only did the rich and powerful have access to the courts

④ Wejen Chang (1994: 314–319), the leading legal historian in Taiwan, however, disagrees about the litigiousness of the Chinese people.

but so did ordinary women, even those who were poor. Many women, especially widows, turned to the courts for help in solving disputes over marriage, inheritance, and property rights. As Mark Allee points out, "petitions from female complainants were a regular, if not common, feature of the court docket."⑤

Although conventional wisdom would have us believe that they were submissive and dependent on the male members of the family, nevertheless, the majority of the lawsuits instigated by women occurred within the family and concerned conflicts over property and inheritance. Mark Allee, for instance, details a legal case that continued for over ten years in which a widow named Mrs. Chou and her son sued her deceased husband's three brothers for, what she considered, her rightful share of the family estate.⑥ Some Chinese women evidently did not remain compliant in their homes but readily took advantage of the legal system to demand what they must have considered to be their rights. Even though wives were not supposed to sue family members or their husbands, actual case records reveal that they did initiate suits, and occasionally even received favorable decisions from local magistrates.⑦

In the Ch'ing period written documents, especially contracts, were already in widespread use, and consequently their acceptance as physical evidence in courts were also becoming indispensable. In fact, contracts became quite pervasive in the Ch'ing period in regulating local society and interpersonal relationships. Magistrates carefully examined contracts, land deeds, and other written records before deciding cases. In the above mentioned case involving Mrs. Chou, she supported her claims to family property by presenting a contract which had been signed by her husband

⑤ Allee 1994: 147.

⑥ Allee 1994: 137–147.

⑦ See Allee 1994: 168–172; and Ocko 1990: 212–230.

and his three brothers. She also presented to the magistrate another piece of written evidence in the form of a "monetary assistance acceptance" (*shih-shou pang-chu yin tzu* 實收幫助銀字). Although she eventually lost her case, nevertheless the magistrate accepted the written evidence into the court record. Significantly too, the case was finally settled with both parties signing "compliance bonds" (*tsun-i chieh-chuang* 遵依結狀) as well as several other written documents.⑧ Even though women could not initiate suits for divorce, they were, at least on some occasions, able to use their "marriage contracts" (*hun-shu* 婚書) to force their husbands to abide by their written vows.⑨ While not written into the Ch'ing Code, still it was understood and expected that legitimate contracts would be upheld in courts of law. The legal recognition given to contracts provided a large measure of stability, rationality, and predictability necessary for China's legal development, and also provided important assurances to those coming before the local courts.

Other research also continues in the field of criminal law. Unlike most civil cases which could be settled at the local level, many criminal cases had to be tried or reviewed at higher levels of the judicial system. Serious crimes carrying the death penalty, for instance homicide and robbery, made their way up the judicial ladder to the supreme court, or Three High Courts (*San-fa-szu* 三法司), with final disposition of cases resting in the hands of the emperor himself. As a result, while civil cases are rarely found outside the local archives, criminal cases abound in both local and imperial archives. Researchers now have a tremendous potential of tracing criminal cases from the local courts on up to the highest court in Peking.

Up to now murder cases have attracted the most scholarly atten-

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⑧ Allee 1994: 139–142.

⑨ Ocko 1990: 221; see also Buxbaum 1993: 203–204; and Huang 1994: 160–162.

tion, and several recent studies examine homicides resulting from family disputes. Adrian Davis' dissertation, based primarily on court records contained in routine memorials, explores the dynamics of homicidal conflicts involving spouses, brothers, and other relatives during the 18th century. Through several case studies of domestic homicide he is able to unravel some of the inner mysteries of family life. While most previous studies have looked at the Chinese family through the eyes of Confucian philosophy and codes of law, Davis examines families that were the converse of this ideal model. He asserts that familial homicide cases, while in themselves not representing true models of domesticity, nevertheless allow us to discover the complexities and varieties of family life. These cases show us that there was no absolute fidelity to the hierarchical conception of marital and familial relationships espoused in Confucianism and Ch'ing law. In reality, absolute male authority within the family was often a contested issue between husband and wife. Davis demonstrates that frequently actual conceptions of kinship differed from the orthodox Confucian ideal.⑩ Paola Paderni, who is discussed below, takes up this same theme.

In particular, domestic violence was much more commonplace than once imagined. Regrettably too, as is often the case in contemporary society, wife abuse was by and large tolerated by Ch'ing society and the law.⑪ Most marital conflicts arose over issues of authority and proper behavior. According to James Lee, when women were involved in homicides the victims were usually men, most often their husbands. When wives killed their husbands the act was usually premeditated and involved adultery on their part. Men, however, apparently seldom killed their

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⑩ Davis 1995a and 1995b.

⑪ Davis 1995b: 10.

wives.⑫ The studies by Lee, Davis, and Paderni demonstrate that wife beating was quite common, and, in fact, occasionally provoked some women to murder their husbands. Because a woman entered her husband's family as a stranger susceptible to both physical and mental abuse she tended to regard it as enemy territory. When women committed murder, therefore, if they had an accomplice it was almost always someone outside their kinship network. Husbands beat and killed their wives because, at least according to court testimonies, they were disobedient and unsubmissive. Fights commonly flared up over the preparation and serving of food, whereby wives refused to cook, served cold rice, or were late in delivering a meal out in the fields. Sometimes conflicts arose because the wife remained too attached to her natal family, because she complained too much about her husband's poverty, or because she was having an extramarital affair.⑬ Women, as Paderni explains, were invariably regarded "as the major source of family conflicts, embodying the destructive force of the libido."⑭

Yet women were not entirely helpless in an unhappy or brutal marriage. Some wives escaped through suicide in hopes of finding happiness in the next life and/or using such action as "a weapon of revenge" on their abusive spouses and their families.⑮ Some took lovers and ran away,⑯ while others killed their cruel husbands. Not all Chinese wives were docile and obedient, as the Confucian ideal would have us believe. As Davis asserts: "Thus, on the one hand domestic violence functioned to maintain the dominance and authority of husbands, and with it the unequal hierarchical construction of marriage. On the other hand, however, the eruption of

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⑫ Lee 1991: 124, 128.

⑬ Lee 1991: 129, 133; Davis 1995b: 8–11; and Paderni 1995: 1–32.

⑭ Paderni 1995: 1.

⑮ Ocko 1991: 229; also see Paderni 1991: 135–160.

⑯ See Paderni 1995.

domestic violence also signaled a crisis in the exercise of that authority and an indication that it was preserved only in the face of significant challenge, opposition, and resistance."[17] These sorts of cases offer us a new perspective for viewing gender relationships in late imperial China in which women were not simply victims or pawns, but were capable of exercising significant choices in how they wanted to live their lives.[18] While the archival court records tell us about the women who did not succeed, we can only wonder about how many got away and never came before the judge's bench.

Adultery was a serious crime in late imperial China, and, judging by the frequency of the archival cases, one more customary than the straitlaced Confucian ideals suggest. Sexual misconduct was not only a major source of family disharmony, but also a major concern of the state. As Jonathan Ocko remarks, "so castigatory are the judgements [against adultery] that one might conclude 'lascivious' women rather than rebels were the true enemies of orthodoxy in Chinese legal history."[19] What was perhaps even more disturbing than the woman's sexual license was the fact that such conduct upset family, and especially husband-wife, relationships, and thereby challenged the patriarchal hierarchy upon which the dynastic order itself rested. "These unequal relationships based on gender," according to Paderni, "were essential to Qing [Ch'ing] society, providing the cultural basis for the sovereign-subject bond from which the state derived its power."[20] This helps to explain why both the state and society placed so much emphasis on keeping women under control. So important was this issue that during the mid-Ch'ing period there was a

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[17] Davis 1995b: 11.

[18] Paderni 1995: 26–127.

[19] Ocko 1991: 217.

[20] Paderni 1995: 1.

"Confucian revival" focusing on the family that reached downward to the common people. The state had even organized "propaganda campaigns" to champion the virtues of wifely fidelity and service.㉑

Interestingly though, adulterous affairs were often tolerated, and sometimes encouraged, within the family as long as they remained secret to outsiders. In fact, in numerous cases the so-called adultery was nothing less than prostitution whereby the husband sold his wife's services to some other man for money or in lieu of repayment of a debt.㉒ Once the affair became known to the outside world, however, the two lovers would often have to elope in order to save face. Nevertheless, the act of running away, which in itself was a crime, was more than a survival strategy for the women involved. It was also, according to Paderni, "a search for freedom and the possibility to fulfill their desires." In traditional China where marriages were arranged and romantic feelings were suppressed within the family system, adultery became a viable alternative for a woman seeking affection, love, and a meaningful relationship. Paderni explains that those women who engaged in extramarital affairs or who ran away discarded the old Confucian values in favor of the new values of the market economy: "new economic opportunities arose, suggesting that an individual's destiny could also be of his or her own making."㉓

Conclusion

The new legal history has already made significant contributions in the field of Chinese studies in general, and is just now beginning to make important contributions to the history of women and the family. Archival

㉑ Mann 1991: 205–206.

㉒ Davis 1995b: 8.

㉓ Paderni 1995: 5, 7, 9, 27.

research has allowed scholars to look at old problems in new ways, raising challenges to many aspects of traditional China's culture, law, and society that had been taken for granted. The archival case records are providing us with a more realistic reconstruction of the everyday life of the common people. New studies can inform us more precisely about the position of women, their legal standing, and economic roles both within the family and in society at large. They can also tell us something about the beliefs and values of ordinary women.

This new social history of law reveals a Chinese society that was highly diverse and complex, and in fact one that often deviated substantially from Confucian ideals and norms. Instead of a society which was homogeneous and integrated, we see one that was contentious and fragmented. As several of the studies cited above show there was a segment of the Ch'ing population, notably among ordinary women, but not limited to them, who rejected the values and moral standards of the orthodox ruling class and tried to create a new world of their own. Of course, the very fact that their cases appeared in courts of law indicates that they failed to fulfill such dreams. But at least they did have their own dreams and it is important that we take these into consideration when rewriting the history of ordinary women in the Ch'ing period. As Paderni explains about the women she has studied: "The importance placed on the search for happiness, prosperity, love, and beauty were new values that had such a wide diffusion that the elite, fearing the loss of its leading role in society, was forced to insist on the strict adherence to old values, placing particular importance on propriety, frugality, and the separate roles of men and women."[24]

While we are learning much more about traditional Chinese women and women's culture, the present research is only at the beginning stage. Archival research has great potential for bettering our understanding of

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[24] Paderni 1995: 27.

how Chinese society actually worked, and how ordinary men and women really lived. We already have important studies, based on actual legal cases, which present new interpretations of the role of women in the family and male-female relationships. We also know now that wife battering was common in the Ch'ing era, but what about physical and sexual child abuse? We need to know more about the domestic violence of women towards female servants that Susan Mann has pointed out.㉕ Most of the studies focus on women as victims and plaintiffs, but what about women who committed crimes, especially serious crimes?

Also these new studies tell us very little about how women were treated in courts of law. Were women allowed the same rights as men before the law? Did they receive any special treatment in court?㉖ Was the law code and actual practice of the law consistent? In a preliminary study of imperial China's law codes, Kathryn Bernhardt argues that the Ming-Ch'ing transition was not a turning point in Chinese women's history. The major change for women, when seen from the perspective of the law codes since the Sung dynasty, was a greater legal incorporation of married women into their marital family while weakening their legal ties to their natal family.㉗ While the law codes were apparently progressively restrictive and repressive with regards to women, the actual case records nevertheless seem to indicate that women were at times able to use the laws to their own advantage. The issues raised by Bernhardt are important but need to be further studied before any firm conclusions can be made.

Several of the above studies also raise questions about sexuality in late imperial China.㉘ A recent study by Dorothy Ko informs us about

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㉕ Mann 1991: 220.

㉖ Allee's study (1994: 168–174) begins to address several of these issues, but clearly much remains to be done.

㉗ Bernhardt 1996.

㉘ The recent dissertation by Matthew Sommer (1994), based heavily on the Pa-

concepts of sexuality and sexual desire among members of the elite, particularly those of the scholar Li Kung.㉙ Further archival research will allow us to reconstruct Ch'ing sexuality in all its complexities and contradictions. We will be able to better understand not only the position of the state and ruling class on what they defined as acceptable, but also, and more importantly, the perceptions of what society considered "normal" and "permissible". As in the early modern West,㉚ did Ch'ing China also develop a "culture of illicit sexuality"? How did urbanization and other socioeconomic changes affect attitudes towards sexuality?

Along side marriage and the family, was there not also a parallel culture of prostitution, adultery, fornication, and pornography? The state considered such activities as crimes, but can we simply take it for granted that ordinary men and women were in agreement? The court records seem to tell us a different story.

While not everyone will agree with my interpretation of the direction that the recent archival-based research is taking us, it is unquestionably certain that this research is important for our understanding of the lives and culture of ordinary women in late imperial China. Ongoing and future research will surely address these and many other issues, presenting many new challenges to the conventional wisdom.

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hsien archives, addresses questions of adultry and sexuality in the Ch'ing period. Unfortunately, I have not yet had a chance to read his dissertation.

㉙ Ko 1996.

㉚ See Ruggiero 1985.

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